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Supreme Court of the United States.

October Term, A. D. 1899.

Farmers' Loan and Trust Company,
Plaintiff in Error,

vs.

The Lake Street Elevated Railroad Company, The American Trust and Savings Bank and The Northern Trust Company,
Defendants in Error.

Writ of Error to the Supreme Court of Illinois.

Brief for Defendant in Error The Lake Street Elevated Railroad Company.

CLARENCE A. KNIGHT,
SOLICITOR FOR THE LAKE STREET ELEVATED RAILROAD COMPANY.

Rand, McNally Printing Company, 45 Dearborn St., Chicago.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

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STATEMENT.

The defendant in error, The Lake Street Elevated Railroad Company, is a corporation organized in 1892 under chapter 114 of the Revised Statutes of the State of Illinois, known as the General Railroad Act, that is, the act under which commercial railroads are organized in the State of Illinois. After its organization it acquired the property and rights of a corporation known as the Lake Street Elevated Railway Company, including its rights under various ordinances of the City of Chicago. These ordinances granted to the railway company the right to construct that which is commonly known as an

elevated railroad on Lake street in the City of Chicago. The railway company, under these ordinances, constructed a little over one mile of structure upon which to rest its railroad tracks, consisting of foundations, posts, cross and longitudinal girders. The railway company gave a mortgage and issued bonds thereunder to the amount of $812,000, which were assumed by the railroad company in the transfer above noted. On April 7, 1893, the railroad company made, executed and delivered a trust deed or mortgage running to the American Trust and Savings Bank of Chicago, Illinois, as trustee, and to the Farmers' Loan and Trust Company of New York, as co-trustee, to secure a proposed issue of bonds to the amount of $6,500,000.

The American Trust and Savings Bank is a corporation organized under the laws of the State of Illinois, and the Farmers' Loan and Trust Company is a corporation organized under the laws of the State of New York. Of this issue of $6,500,000 of bonds, $1,000,000 were to be certified and held by the trustee to be given in exchange for the $812,000 of railway company bonds; $350,000 were to be retained by the company to be used for its lawful corporate purposes, and $5,150,000 were to be used to complete the railroad of the company. The bonds were of the denomination of $1,000 each, and the 1,000 bonds were issued and used to take up and release the railway company mortgage. The $5,150,000 of bonds were in part sold under an underwriting agreement at 90 cents on the dollar, with a gift or bonus of stock of the railroad company equal to the par value of the bonds. The trust deed provided for an additional issue of bonds, and under which provisions additional bonds were issued, until in January, 1895, there had been issued 7,474 bonds, or $7,474,000.

The company was unable to pay the interest falling due each six months on the first days of January and July in each year, and in January, 1895, appointed a committee from its stockholders to meet a like committee from the bondholders and endeavor to adjust the matter of the bonded indebtedness without recourse to foreclosure proceedings. The committee did finally agree upon an arrangement under which the bondholders were to deposit their bonds with The Northern Trust Company, one of the defendants herein, and the railroad company was to issue for each bond so delivered a debenture bond for sixty per cent. of the face thereof and which was to rest for security upon the bonds so deposited. The ownership of the original bonds under the instrument was declared to be in the Northern Trust Company. When the 7,474 bonds had all been deposited, then, and not before, forty per cent. of the same were to be destroyed, and the original bonds to the amount of sixty per cent. of the whole deposited were to be delivered to the holders of the debenture bonds, so that in the end only sixty per cent. of the original mortgage bonds would remain under the mortgage. The debenture bonds were to draw interest at five per cent per. annum, payable in January and July, the same as the original bonds, and were made to mature in 1928, the date of the maturity of the original bonds. In addition to sixty per cent. of the original bonds, the company agreed to issue for each bond delivered to the Northern Trust Company an income bond for fifteen per cent. of the par value of the bonds, or for each $1,000 of the bonded debt of the company there was to be issued its obligation for the principal sum of $150, payable in 1928, and the company was to agree to pay interest upon the income bond at five per cent. per annum out of the net earnings for each fiscal year, and to be non-cumulative.

Under this arrangement there was deposited $6,595,000 par value of bonds (Pr. Rec., 363), leaving outstanding $879,000. Of these 610 were owned by William Ziegler of New York, a former director and stockholder of the company, leaving 269 bonds that did not come into the bond adjustment. The bonds were deposited under an instrument of trust dated March 1, 1895 (Pr. Rec., 364). This agreement provided it should become non-effective unless 3,800 of the 7,474 bonds were deposited on or before April 1, 1895. It further provided that the deposit of the respective bonds "shall place and transfer to said Northern Trust Company the full and complete title to such mortgage bonds and coupons, in trust for the purposes hereinafter expressed."

On April 8, 1895, William Ziegler filed a bill in the Circuit Court of the United States for the Northern District of Illinois, Northern Division, in his own behalf and on behalf of all the stockholders, bondholders and persons interested in The Lake Street Elevated Railroad Company. This bill was sworn to on the 26th day of March, 1895, in the State of Florida. (Rec., 1010.) This bill made various charges against the Lake Street Company and its officers, and prayed for the appointment of a receiver, an injunction and other relief. A demurrer was filed to this bill and sustained by Judge Showalter on June 18, 1895. Amendments were then made to the bill on July 27, 1895, and demurrers sustained to the bill as amended, from which an appeal was taken to the United States Court of Appeals for the Seventh Circuit. Such proceedings were had in that court that the decree of the Circuit Court was affirmed. See opinion of Judge Showalter in

Ziegler v. *L. S. E. R. R. Co.*, 69 Fed. Rep., 176.

See opinion of the Circuit Court of Appeals in *Ziegler* v. *L. S. E. R. R. Co.*, 76 Fed. Rep., 662.

For full statement of the facts that were set out in the Ziegler bill we refer the court to the opinion of Judge Showalter.

Immediately after the proceedings were had before Judge Showalter Ziegler served a demand upon the Farmers' Loan and Trust Company that they should proceed to foreclose the mortgage. This the Farmers' Loan and Trust Company refused to do. (Pr. Rec., 227.)

On December 31, 1895, the Lake Street Company filed a bill in chancery in the Circuit Court of Cook County, Illinois, against William Ziegler and others, as the holders of $605,000 of bonds of the Lake Street Company. This bill made various charges against Mr. Ziegler; that he had been a director of the Lake Street Company when the construction contract was let, and that he had received stocks and bonds from the contractors, and other considerations for making the contract (Pr. Rec., 301), and it asked that these 605 bonds be delivered up to the company, the company offering to pay whatever might be found due and owing to the parties upon final accounting. Mr. Ziegler and others were made defendants, including the American Trust and Savings Bank and the Farmers' Loan and Trust Company, co-trustee. The bill prayed for an injunction, and one was granted under bond in the penal sum of $25,000. This injunction was issued and duly served, and thereupon the trustees under the mortgage and Ziegler and others were enjoined from taking any proceedings under the trust deed or mortgage or foreclosing the same, for or by reason of the

request or demand made upon them by the holders of said 605 bonds. No other bondholders had asked or requested the trustees to take any action or proceedings whatsoever except the Ziegler bonds, so called.

On January 27, 1896, a conference was held, at which were present the counsel for the American Trust and Savings Bank, the counsel for the Farmers' Loan and Trust Company, and also the counsel and president of The Lake Street Elevated Railroad Company. This was called with reference to the request by the Farmers' Loan and Trust Company to the American Trust and Savings Bank to join in the filing of a bill of foreclosure. After the conference the American Trust and Savings Bank, on the following day, notified counsel for the Farmers' Loan and Trust Company that it would not join any foreclosure. It was stated at the conference that no other demand or request had been made by any bondholders upon the trustees to take any action looking to a foreclosure of this mortgage except the ones made by Ziegler and associates, and injunction had been issued as to them. Notwithstanding the fact that no other bondholder had made the request or demand, and that the trustees had been enjoined, yet the Farmers' Company were bound to force the foreclosure of this mortgage. Thereupon, on January 29, 1896, they sent a letter to the president of the Lake Street Company, stating that on the following day, January 30, it would file a bill to foreclose, notwithstanding the fact that the American Trust and Savings Bank had refused to join. This bill was filed on January 30, at 10:35 A. M., and sworn to on January 29, 1896. (Pr. Rec., 255. Process was taken out but not served until February 18, 1896. On January 30, 1896, the bill now before the court was filed by the

Lake Street Company against the Farmers' Loan and Trust Company, the American Trust and Savings Bank and the Northern Trust Company as defendants, and sworn to January 29, 1896. The bill prayed for writ of injunction against the Farmers' Loan and Trust Company to enjoin it from proceeding to foreclose the mortgage or to take any action or proceedings thereunder or prosecuting any foreclosure suit. An injunction was issued under this bill and served upon the counsel for the Farmers' Loan and Trust Company at 11:10 A. M. on January 30. The summons issued under this bill was served on the American Trust and Savings Bank and Northern Trust Company on February 1, 1896, and the Farmers' Loan and Trust Company on February 6, 1896. (Pr. Rec., 30.) This bill set forth the organization of the railroad company, the making of the trust deed of April 7, 1893, that the Farmers' Loan and Trust Company was a corporation under the laws of the State of New York, had not at the time of the making of said trust deed, nor since, complied with the laws of the State of Illinois requiring the deposit with the auditor of public accounts, for the benefit of the creditors of the company, of the sum of $200,000, in stocks of the United States or municipal bonds or mortgages, and at the time of the acceptance and delivery of the trust deed under the mortgage the complainant did not know that the Farmers' Loan and Trust Company had not complied with the law, and that since the acceptance of the trust the Farmers' Loan and Trust Company had been doing business in the State of Illinois without having made a deposit as required by the laws of the State of Illinois. It further set forth that under the mortgage or deed of trust the Farmers' Loan and Trust

Company had appointed one William Burry as its agent under the mortgage. It then set forth the bonds that had been issued under the mortgage, and that it was then operating a railroad in the City of Chicago on Market street, from Madison street to Lake street, and on Lake street westwardly to West 52nd street, and eastwardly on Lake street to Wabash avenue. It set forth that it had not been able to earn sufficient money in operating its road to pay the interest upon its bonded indebtedness secured by the mortgage or trust deed; that notwithstanding that fact Ziegler of New York, conspiring with various persons representing 610 bonds of the total issue of 7,574 bonds, had made a demand upon the Farmers' Loan and Trust Company and American Trust and Savings Bank to proceed to foreclose the mortgage and to take possession of the railroad. It further set forth that the complainant had filed a bill against Ziegler and others enjoining them from taking any action towards foreclosure as the holders of the 605 bonds. It further set forth that on January 27, 1896, the agent of the Farmers' Loan and Trust Company, William Burry, had stated that no other demand for action had been made upon the Farmers' Loan and Trust Company other than that made by Ziegler, but notwithstanding that fact the Farmers' Loan and Trust Company proposed to file a bill to foreclose the mortgage. It further set forth that the interest on all the bonded indebtedness was paid up to the 1st of January, 1895. That the company obtained advancement or loan of sufficient money to pay the interest falling due on January 1, 1895, to each party who would turn over the coupons as security for such advancement. It further stated that, notwithstanding no other persons holding

coupons upon the bonds due on July 1, 1895, and January 1, 1896, had made a demand or request to take any action, other than the 605 bonds, yet the Farmers' Loan and Trust Company, in violation of its duty and for the purpose of injuring and destroying the property and assets of the complainant, intended to, unless restrained, proceed to take possession of or foreclose the trust deed or mortgage. It further stated the holders of 6,574 of the bonds had specially requested the trustees to take no action whatsoever with reference to the failure of the company to provide for or pay the interest upon the coupons due July 1, 1895, and January 1, 1896, and that the American Trust and Savings Bank, after a full examination of the affairs of the company, on the 28th of January, declined and refused to join with the Farmers' Company in any proceedings to foreclose. It further stated it was the desire and wish of the holders of over 6,500 of the bonds that the Farmers' Loan and Trust Company should be removed from its position as trustee under said mortgage, first, "for failure to comply with the laws of the State of Illinois," and second, "for assuming to act or take proceedings under said mortgage contrary to and in violation of the request of the holders of the majority of the bonds issued under the mortgage or deed of trust." The bill then made as defendants the Farmers' Loan and Trust Company, the American Trust and Savings Bank and the Northern Trust Company, and prayed: First. "That a new trustee may be appointed by the court to act under and by virtue of said mortgage or deed of trust attached hereto as Exhibit A, in place and instead of said the Farmers' Loan and Trust Company." Second. "That an injunction *pendente lite* may be issued restraining and enjoining said the Farmers' Loan and

Trust Company from taking any proceedings or bringing or prosecuting any suit or suits or acting in any manner whatsoever under and by virtue of the terms, provisions and conditions of said mortgage or deed of trust; that upon a final hearing hereof said injunction may be made perpetual." Third. "That your orator may have such other and further and different relief in the premises as equity may require and to your Honors may seem meet." (Pr. Rec., 5.)

On January 31, 1896, the Farmers' Loan and Trust Company filed a petition to remove the cause to the United States court. In this petition it stated that there were controversies wholly between citizens of different states, which controversies could be fully determined as between them, and said controversies were between the the petitioner of the one part and The Lake Street Elevated Railroad Company of the other part, and were as follows:

1. "A controversy concerning the right of your petitioner to act as trustee under the mortgage, a copy of which is attached to the bill of complaint."

2. "A controversy concerning the removal of your petitioner as trustee under said mortgage."

3. "A controversy concerning the enjoining of your petitioner from taking any proceedings or bringing or prosecuting any suits, or acting under and by virtue of the terms, provisions and conditions of said mortgage."

The petitioner further stated that "If the controversy in this cause is one and inseparable, then such controversy is wholly between citizens of different states and can be fully determined between them, and the said controversy is between your petitioner on the one part and The Lake Street Elevated Railroad Company on the other part, and

the said other defendants, the American Trust and Savings Bank and the Northern Trust Company are not *proper or necessary* parties in this cause."

The petition was signed by the petitioner, by its solicitors. The petition further recites that on the 30th of January, 1896, it filed the bill to foreclose heretofore referred to. It further stated that it offered a good and sufficient bond in the penal sum of $500. (Pr. Rec., 31.)

The document purporting to be a bond was dated January 31, 1896, and was as follows:

"Know all Men by these Presents, that we, William Burry and Rockwell King, of Chicago, in the County of Cook and State of Illinois, are held and firmly bound unto The Lake Street Elevated Railroad Company in the penal sum of five hundred dollars ($500) lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves and our heirs, executors or administrators, jointly and severally and firmly by these presents.

Witness our hands and seals this 31st day of January, A. D. 1896.

The condition of the above obligation is such that if the Farmers' Loan and Trust Company shall enter and file or cause to be entered and filed, in the Circuit Court of the United States in and for the Northern District of Illinois, Northern Division, on the first day of its next session, a copy of the record and proceedings in a certain suit or action now pending in the Superior Court of Cook County, in the State of Illinois, bearing general number 172,156, in which said Lake Street Elevated Railroad Company is complainant and said Farmers' Loan and Trust Company and others are defendants, and shall pay all costs that may be awarded by the said Circuit Court of the United States, if said Circuit Court shall hold that said suit was wrongfully or improperly removed to said United States Circuit Court, then this obligation to be void, otherwise to remain in full force and effect.

WILLIAM BURRY. [SEAL.]
ROCKWELL KING. [SEAL.]"

On the 1st day of February a motion was made to grant the petition and approve the bond. After a full hearing, and objections being made, the court (Judge Payne) denied the right of removal.

See opinion of Judge Payne. (Pr. Rec., 536.)

The order of court denying the petition is found in Pr. Rec., 36.

The appearance of the Northern Trust Company was filed in the cause January 31, 1896, and appearance of the American Trust and Savings Bank on February 1, 1896, and answer by it on March 18th. On the 17th of March the Northern Trust Company filed its answer, and on the 18th of March the Farmers' Loan and Trust Company entered its appearance, and asked leave to file an answer. (Pr. Rec., 39.) On the 25th of March, 1896, the Farmers' Loan and Trust Company filed its answer. (Pr. Rec., 45.)

By reason of conflict apparently arising between the United States court and the state court, the injunction theretofore granted on the bill was on April 1, 1896, dissolved, and on April 22nd the Farmers' Loan and Trust Company was given leave to file an amended answer, which was filed on April 28, 1896. Replications were duly filed to the respective answers, and on May 5, 1896, the cause came on for hearing before Judge Payne. After a very full hearing a final decree was entered on June 4, 1896. (Pr. Rec., 71.) From this decree of the Superior Court an appeal was taken to the Appellate Court for the First District of Illinois. After hearing in that court the decree was affirmed by an opinion filed February 9, 1897.

F. L. & T. Co. v. *L. S. E. R. R. Co.*,
68 Ill. App., 666.

From the affirmance of the Appellate Court the Farmers' Loan and Trust Company perfected an appeal to the Supreme Court of the State of Illinois, and opinion was handed down by that court June 18, 1898, affirming the judgment of the Appellate Court and the decree of the Superior Court.

F. L. & T. Co. v. *L. S. E. R. R. Co.*,
173 Ill., 439.

On July 7, 1898, application was made to Mr. Justice Brown for writ of error in said cause. Objections were made to the granting of this writ, and it was only granted upon condition that counsel for the plaintiff in error and for the Lake Street Company should enter into a stipulation that no further proceedings should be taken in the foreclosure case nor in the proceeding in the Superior Court in this cause until this Honorable Court could pass upon a motion to dismiss the writ of error to be made to the October term, 1898. This motion was made, and upon a hearing was continued to the final hearing of the cause.

The questions involved in this cause were very fully argued in the brief submitted on that motion on behalf of the Lake Street Company and the American Trust and Savings Bank, and we respectfully refer the court to the briefs and papers submitted on that motion, and ask that they may be considered on this final hearing.

After the Superior Court denied the motion for removal a transcript of the proceedings was filed in the United States court. A motion was there made on February 5th by the Northern Trust Company, after it had entered its appearance in the state court, and on February 17th by the American Trust and Savings Bank, after

it had entered its appearance in the Superior Court, to remand the cause to the Superior Court. The motion to remand came on for hearing before Judge Grosscup on February 18th, and the same day, while injunction was still in force, the Farmers' Company caused a subpœna in the foreclosure case to be served on the Lake Street Company. On March 16th Judge Grosscup entered an order denying the motion to remand and modifying injunction. Afterwards, when the conflict arose between the state court and the United States court as to which had jurisdiction, the injunction was dissolved in both courts.

Opinion of Judge Grosscup, in *L. S. E. R. R. Co.* v. *F. L. & T. Co.*, 72 Fed. Rep., 804.

From the order of Judge Grosscup dissolving the injunction an appeal was taken to the United States Court of Appeals. That court declined to pass upon the question as to whether the state court erred in refusing to permit the cause to be removed, or whether Judge Grosscup erred in refusing to remand the cause, holding that if the order of the United States court was improper then its order to dissolve the injunction was a nullity.

L. S. E. R. R. Co. v. *F. L. & T. Co.*, 77 Fed. Rep., 769.

The questions as to the merits of the bill have been determined by the Supreme Court of the State of Illinois under the construction of the statute of that state, in which it held that the Farmers' Loan and Trust Company had no right to act under the mortgage or trust deed without a compliance with the statute of the State of Illinois requiring a deposit of $200,000 with the state

auditor. Therefore, we conceive that the only Federal question involved in this controversy now before this court is as to whether the state court erred in refusing to permit this cause to be removed to the United States court. Counsel for the plaintiff in error in their brief state that the only questions presented by the assignment of errors are:

1st. That the ruling of the Supreme Court on the question of the bond was erroneous.

2d. That the case only involved a single controversy, and that the American Truat and Savings Bank and the Northern Trust Company were not indispensable or even necessary parties to the controversy, and that even if they were they should not be arranged on the same side with the plaintiff in error.

3d. That there were two or more separable controversies which could be fully determined as between the Lake Street Company and the Farmers' Company without the presence of the other two defendants.

4th. That the purpose of the bill was to enjoin the further prosecution in a court of the United States of a suit previously brought in that court by the Farmers' Company, and, therefore, involved a Federal question.

5th. That the state court erred in proceeding with the cause after motions to remand had been made and decided by the United States court.

6th. That the injunction of the state court in this cause enjoining the further prosecution of the foreclosure suit, and of which that court acquired jurisdiction before the filing of the bill in this case, was without juris diction in violation of the right of the plaintiff in error to prosecute a suit in the United States Court, and, therefore, reviewable in this court by the present writ of error.

The first three grounds stated by the plaintiff in error are perhaps before this court. The last three are not subject to review by this court in this proceeding, as it is attempted to show a Federal question by pleadings subsequent to the original bill, and also for the reason that no assignment of error was made in the Supreme Court of Illinois raising these three last points and also because the judgment of the Superior Court can be fully sustained upon other grounds not involving a Federal question.

As to the third point that there were two or more separable controversies that could be fully determined as between the complainant and the Lake Street Company, we say that there was but one controversy and that was not wholly between the plaintiff in error and the Lake Street Company and could not be determined without the presence of the other parties.

In the opinion of Judge GROSSCUP in denying the motion to remand, he said: "If the sole purpose of this bill were to remove the Farmers' Loan and Trust Company as trustee under the trust deed, there could be no doubt of the indispensableness of either the bondholders or the remaining trustee as parties to the suit."

Since the decision of Judge Grosscup three different courts have held that the purpose of the bill was to appoint a new trustee in place of the Farmers' Loan and Trust Company for the reason that the Farmers' Loan and Trust Company was incapable of acting under the laws of the State of Illinois and its appointment as trustee was void. But we also contend that the petition and bond for removal were both defective and not in compliance with the Act of Congress.

At the time of the trial of the cause there were but

$876,000 of bonds that had not agreed to the scaling arrangement. Out of these 610 were represented by one William Ziegler of New York. A bill had been filed and injunction was pending to prevent the trustees and Ziegler from foreclosing by reason of any request by 605 of the 610 bonds. This bill was filed for an accounting against Ziegler on the ground that he had obtained the bonds unlawfully, leaving only 266 bonds, according to the then situation of affairs, that had not at that time agreed to the scaling arrangement. But not one of these 266 bonds had made any demand or request on the part of the trustees for any action with reference to the foreclosure of the mortgage.

The bill filed against Ziegler and amended bill are shown in Pr. Rec. 301 to 307.

The only question raised by this bill in the state court and considered by the *nisi prius* court and by the Appellate and Supreme Courts was as to whether under the act of the State of Illinois requiring a foreign corporation to make a deposit with the state auditor of the sum of $200,000, the Farmers' Loan and Trust Company was ever lawfully appointed as trustee. Other matters were stated in the bill but not considered by either of the three courts. The Supreme Court of Illinois having determined that question, and which determination was in conformity with the previous decisions by that court, even should this cause be reversed then if it should go to trial in the United States court the construction so placed by the Supreme Court upon the state statute would be binding upon that court. And a reversal would only lead to further delay and further injury.

Counsel state that there are other questions than the one last stated that might be involved if the case should go to

the United States court for trial. But we assert that an examination of the records will show that neither of the other questions stated by counsel would have any bearing upon the further hearing of the cause. Not a single good reason has been given by the plaintiff in error why in right and in justice there should be any further contention upon its part as to the right to hold this trusteeship, except so far as the record shows that it is now acting through its counsel before this court, as it did all through the state courts, as the representative of the one holder of bonds who of all others should have joined in the arrangement to save the Lake Street Company from foreclosure and wreckage. He was a director when the mortgage was made, he purchased 145 of the bonds as shown by this record at 52 cents on the dollar, and other bonds were sold at 50 cents on the dollar, as shown by this record, with the knowledge of plaintiff in error in this case. The scaling arrangement, so called, gives to each bondholder 75 per cent. of the principal and interest on 60 per cent. thereof absolutely and on 15 per cent. in case the net earnings of the company are sufficient to pay it. A large amount of the floating debt, nearly half a million dollars, was included in the purchase of property that has become subject to this trust deed and mortgage and for the benefit of these very bondholders.

Counsel for plaintiff in error, on pages 16, 17 and 18 of their brief refer to *facts* that are not in this record nor before this court. To be sure an act was passed by the General Assembly of the State of Illinois amending the act requiring trust companies to deposit $200,000 with the state auditor. This act was approved and in force April 24, 1899, and there was also an amendment passed, approved May 7, 1897, in force July 1, 1897, nearly a

year after the decree was rendered in this cause. The amendment of May 7, 1897, provided that the act should not apply to "taking or accepting mortgages or trust deeds to secure bonds or money loaned." That act did not exempt the plaintiff in error from making the deposit required by the State of Illinois for the purpose of accepting trusts. While the cause was pending in the Supreme Court, and under advisement by that court, the plaintiff in error sought to have the court set aside the order taking the case under advisement, claiming that by passage of the act of May 7, 1897, the decree was thereby annulled, but the court refused so to do.

The act approved April 24, 1899, provides:

"No corporation authorized to accept and execute trusts shall, either directly or indirectly, through any officer, agent or employ of such corporation, certify to any bond, note or other obligation to evidence debt, secured by any trust deed or mortgage upon, or accept any trusts concerning property located wholly or in part in this state, without complying with said act and the amendments thereto, and any trust deed or mortgage given or taken in violation of the provisions of said act and the amendments thereto shall be null and void."

It is, therefore, clear that the General Assembly has enlarged the provisions of the act with which the trustee in this case has failed to comply, by declaring the trust deed or instrument void. It is stated by counsel that the plaintiff in error, acting in obedience to the statute, has made the deposit required by it. There is no evidence whatever in the record of this statement, and it is wholly gratutious, and we take the liberty of stating in reply that the plaintiff in error has not deposited $200,000 with the state auditor, as required by the laws of the State of Illinois, but such question is wholly irrelevant and immaterial upon this writ of error, and counsel has no right to make

such statement outside of this record. The record does show that before the decree was entered by the state court in this case full opportunity was given, and the plaintiff in error was asked to comply with the laws of the State of Illinois with respect to making a deposit. This it declined to do. (See decree, Pr. Rec., 98.)

It comes with ill grace from the plaintiff in error, after having stood in defiance of the laws of the State of Illinois, that now at the last moment it places itself on the penitent block and asks to be relieved from the just results of its failure to comply with the laws of the state.

The greater portion of the brief and argument of the plaintiff in error is devoted to questions that do not come before this court upon this writ of error. Counsel have attempted to discuss questions arising from facts stated in their petition for removal and from conclusions that they draw from the answers of defendants and as to what took place at the trial of this cause. All such matters are wholly irrelevant and immaterial upon this appeal, and the only question for determination of this court is as to whether the court erred in refusing to permit this cause to be removed. That question must be determined upon the bill of complaint alone. That such is the law has been determined by this court so clearly and distinctly that we are surprised that counsel should attempt to reargue or becloud this case by setting forth matters that do not properly come before this court for determination. We can see no justification for such course except upon the ground that counsel are aware that this appeal is frivolous and taken for the purpose of delay. The amount of printed matter that may be submitted by counsel for plaintiff in error should not prevent this court from holding that this appeal is frivolous and taken

for the purpose of delay. Let us see for a moment if this is not true.

First. The bill was filed for the appointment of a new trustee upon the theory and ground that no second trustee had lawfully been appointed. That the instrument showed that it was the intention of all parties there should be two trustees. The appointment of the Farmers' Loan and Trust Company under the laws of the State of Illinois being void, there was in law no appointment of a second trustee. Under the trust deed it would be doubtful whether the American Trust and Savings Bank would have the power to appoint a second trustee. The object of the bill is to be determined by the relief sought by the complainant and not by the facts set forth in the bill as to why it should be entitled to that relief. The object being for the appointment of a new trustee, it was absolutely necessary that the American Trust and Savings Bank and the *cestuis que trustent* should be made parties defendant to that cause. The American Trust and Savings Bank and the Northern Trust Company, both residents of the State of Illinois, necessarily deprived the United States court of jurisdiction over the cause.

Second. The United States court would not have had, under the act of 1887, corrected by the act of 1888, jurisdiction by original suit, and not having jurisdiction by original suit the cause was not removable.

Third. The amount in controversy was not sufficient to give the United States court jurisdiction. There is no pecuniary value involved in the mere right to act as trustee. The trustee was not holding any property, was not in possession of any property and could not claim possession of any property under the facts as set forth in the bill, and therefore there was no pecuniary amount in-

volved in the mere right to act as trustee. And neither does the petition set forth that *at the time* the bill was filed the amount in controversy exceeded $2,000.

Fourth. The document purporting to be a bond was no bond at all upon which the plaintiff in that cause could have recovered. It was not signed by the petitioner and the petitioner was not even named in the bond as one of the obligors, as principal or otherwise. The Supreme Court of Illinois, following numerous decisions of that court, held that there was no bond at all.

These are the only matters involved in this record, and it being very clear that the cause was not removable and that there was no bond filed within the meaning of the law, it is apparent that the appeal is taken for the purposes of delay and is frivolous.

POINTS.

I.

UNDER THE ACT OF 1887 AS CORRECTED BY THE ACT OF 1888 A CAUSE BROUGHT IN THE STATE COURT IS NOT REMOVABLE TO THE UNITED STATES COURT UNLESS THAT COURT WOULD HAVE HAD JURISDICTION BY ORIGINAL SUIT.

See comparison of acts of 1875 and 1887, 127 U. S., 786.

In

Mexican Nat'l R. R. Co. v. *Davidson*, 157 U. S., 201,

this court said:

"We must hold, therefore, as has indeed already been ruled, *Tenn.* v. *U. & P. Bank*, 152 U. S., 454, that the jurisdiction of Circuit Courts on removal by defendant under this section is limited to such suits as might have been brought in that court by the plaintiff under the first section."

In

Tenn v. *U. & P. Bank*, 152 U. S., 454,

this court said:

"But the corresponding clause in section 2 allows removals from a state court to be made only by defendants and of suits 'of which the Circuit Courts of the United States are given original jurisdiction by the preceding section,' thus limiting the jurisdiction of a Circuit Court of the United States on removal by defendant under this section to such suits as might have been brought in that court by the plaintiff under the first section. The change is in accordance with the general policy of these acts manifest upon their face and often recognized by this

court to contract the jurisdiction of the Circuit Courts of the United States."

In re Cilley, 58 Fed. Rep., 977,

Judge Aldrich held that the right of removal is restricted by section 2 of act of 1887 to the class of cases in which original jurisdiction is given to the United States courts by section 1.

In

La Montagne v. *T. W. Harvey Lumber Co.*,
44 Fed. Rep., 645,

Judge JENKINS said:

"It is apparent from the language of the act that no suit can be removed to a Federal court which could not originally have been brought there, except when the sole objection to the original jurisdiction was the non-residence of the defendant."

II.

THE CIRCUIT COURT OF THE UNITED STATES WOULD NOT HAVE JURISDICTION OVER THIS CAUSE FOR THE REASON THAT THE AMERICAN TRUST AND SAVINGS BANK AND THE NORTHERN TRUST COMPANY WERE NOT ONLY PROPER AND NECESSARY BUT INDISPENSABLE PARTIES TO THE CONTROVERSY, AND WERE BOTH CITIZENS OF THE STATE OF ILLINOIS.

If the American Trust and Savings Bank or the Northern Trust Company were proper parties to this suit, then the cause was not removable, but they were not only proper parties, they were absolutely necessary parties, and therefore indispensable to the proper determination of the question involved in the litigation.

The object and purposes of the bill were, as held by the

courts below, for the appointment of a new trustee in place of the Farmers' Loan and Trust Company.

It was contended strenuously in the courts below that the bill should fail for the reason that all the holders of bonds were not made parties to the suit, but it was held by the Supreme Court that all parties were before the court necessary for a final decree on the doctrine of representation, and it was also held that the American Trust and Savings Bank and the Northern Trust Company were both necessary parties, and that the cause could not proceed to final decree unless they had been made parties; that the Ziegler interest, representing 610 bonds, was sufficiently represented by counsel for Ziegler, who appeared in all litigation in the courts below and who now appears before this court.

In

P. C. & St. L. R. R. v. *B. & O. Ry. Co.*,
61 Fed. Rep., 705,

it was held by the court the presence of even a proper party would defeat jurisdiction. In that case the court said:

"Being a proper party it makes a cause in which a corporation of Maryland and a corporation of Ohio are on one side of the controversy, while another corporation of Ohio is a party upon the opposite side. This arrangement operates to deprive the Federal court of jurisdiction. The very late case of *Wilson* v. *Oswego Tp.*, 151 U. S., 56, is a case much in point. There Federal jurisdiction was held to be defeated as to a defendant whom the court thought an unnecessary party to the relief sought by the complainant, yet a proper party because of its interest in the controversy. We are clearly of opinion that while Central Ohio was not a necessary party to an accounting between the B. & O. R. R. Co. and the P. C. & St. L. Ry. Co., yet it was in view of its interest in the issues arising upon that account a

proper party. The decree must be reversed with directions to the Circuit Court to dismiss the bill with costs."

In

Wilson v. *Oswego Tp.*, 151 U. S., 56,

this court held that

"The railroad company was a proper if not a necessary party, as it had an interest in the question whether Burgess had performed his contract and earned the bonds. Considering the nature of the case and the relief sought thereby, these defendants cannot be treated and regarded as purely formal and unnecessary parties."

It would seem from the above cases that in order to give the United States court jurisdiction it would be necessary to hold that the American Trust and Savings Bank and the Northern Company were mere formal, unnecessary or nominal parties, within the rule laid down in the Wilson case.

Where no binding decree could be entered without presence of an indispensable party before the court, cause will be dismissed on motion.

Metamora v. *Eureka*, 163 Ill., 16.

In

Construction Co. v. *Cane Creek*, 155 U. S., 283,

it was held the Deposit and Trust Company was the party in possession, and although it claimed no interest in the bonds as against the plaintiff and his co-defendant, yet possession could not be enforced in favor of the plaintiff except by a decree against it. And it was, therefore, held to be an indispensable party.

In the case at bar no decree would establish the end sought, viz, the appointment of a new trustee, except by having a decree against the American Trust and Sav-

ings Bank. A decree was entered requiring the American Trust and Savings Bank to make the appointment within thirty days, or in case of failure so to do, then the court reserved to itself the power to make the appointment. In no other manner could the plaintiff have obtained the relief sought in the case any more than could the complainant in the Wilson case or in the Cane Creek case have obtained possession of the bonds, except by a decree against the defendants.

III.

THERE WAS NO SEPARABLE CONTROVERSY SO AS TO ENTITLE THE PLAINTIFF IN ERROR TO REMOVAL.

In order to entitle the plaintiff in error in this cause to removal on the ground of separable controversy, the controversy as to the plaintiff in error must be wholly separable so that the cause could proceed to a final decree as to the separable controversy without the presence of either of the other parties to the suit. In order to make the cause separable within the meaning of the act the separability must be of that nature that the plaintiff in the original suit might have begun the cause in the United States court without making either the American Trust and Savings Bank or the Northern Trust Company, or any other holder of bonds parties, to the litigation.

As stated by this court in

Wilson v. *Oswego Tp.*, 151 U. S., 56,

in quoting from the case of *Torrence* v. *Shedd*, 144 U. S., 527, in reference to removal of a cause on the ground that there was a separable controversy:

"But in order to justify such removal on the ground of a separable controversy between citizens of different

states, there must by the very terms of the statute be a controversy 'which can be fully determined as between them,' and by the settled construction of this section the whole subject-matter of the suit must be capable of being finally determined as between them and complete relief afforded as to separate cause of action without the presence of others originally made parties to the suit."

The court then said:

"Considering the character of the relief sought by the original bill and the situation of the parties, it cannot be properly said that the whole subject-matter of the suit was capable of being finally determined between the plaintiff on the one side and Montague and the Oswego Township on the other, without the presence of the Union Savings Association, so as to warrant the removal as a separable controversy."

"A defendant has no right to say that an action shall be several which the plaintiff seeks to make joint."

Powers v. *C. & O. R. R. Co.*, 169 U. S., 92.

Different defenses do not make separable suit.

Mut. Reserve Fund, etc., v. *Farmer*, 77 Fed. Rep., 929.

Hay v. *Caspar*, 31 F. R., 499.

So in this case it could not proceed to a final decree as between the Lake Street Company and the Farmers' Company without the presence not only of the Northern Trust Company but also without the presence of the American Trust and Savings Bank.

IV.

THERE WAS NO FEDERAL QUESTION INVOLVED WHICH WOULD ENTITLE THE PLAINTIFF IN ERROR TO REMOVAL OF THE CAUSE.

Oregon Short Line v. *Skottowe*, 162 U. S., 490.

Mexican Nat'l. R. R. v. *Davidson*, 157 U. S., 201.

Tenn. v. *U. & P. Bank*, 152 U. S., 454.

Postal Telegraph Co. v. *Alabama*, 155 U. S., 482.

Chappell v. *Waterworth*, 155 U. S., 102.

Walker v. *Collins*, 167 U. S., 57.

The above cases so fully determine the question that whether a Federal question is involved must appear from the complainant's bill, that it is unnecessary to cite any other additional authorities, nor is it open for argument. Under these authorities, it is immaterial as to what state of facts the defendant may set up arising subsequent to the filing of the bill in this cause.

Pages 39 to 46 and 104 to 139 of plaintiff's brief are taken up with discussing a supposed Federal question not set forth in the bill of complaint.

In the petition for removal it was set forth that a foreclosure bill had been filed in the United States court prior to the filing of the bill in this cause (Pr. Rec., 32). It was not, however, set forth in the petition that there had been any service of process in the foreclosure case prior to the service of process in this case. The plaintiff in error was served in this case on February 6th, and the other defendants on February 1, 1896. A subpœna was

not served in the foreclosure case until February 18th, and when the injunction issued in this case had not been dissolved by either the state or Federal court. Such service in violation of injunction is in law considered as a nullity. *U. T. A.* v. *S. N. Co.*, 130 U. S., 570. But even if the Federal question were thereby involved, then it would have been necessary that the other two defendants should join in the petition for removal, which they did not.

V.

THE PAPER FILED PURPORTING TO BE A BOND WAS NOT IN COMPLIANCE WITH THE ACT OF 1888.

The act of 1888 provides that in case of removal that the petitioner at the time of filing his petition "shall make and file therewith a bond with good and sufficient surety." The act of March 3, 1875, used the same language. But the act of September 24, 1889, and of July 27, 1866, and of March 2, 1867, only provided that the parties should "offer good and sufficient surety."

The state court, in passing on the question of removal, held that under the act of 1888 the petitioner must make and file the bond. Judge PAYNE, in passing upon the question of the bond, said:

"Two questions are presented by the counsel for the various parties, first, whether or not the bond as filed by the Farmers' Loan and Trust Company is sufficient to base a removal upon. Second, whether or not, assuming the bond is good, the controversy is separable so as to enable the Farmers' Loan and Trust Company to prosecute the suit without the trustee, the American Trust and Savings Bank, being a party to the suit. In regard to the first point, that is, the sufficiency of the bond, the bond is signed by William Burry and Roswell

King. It is not the bond of the Farmers' Loan and Trust Company, and does not purport to be."

And further said that:

"If the statute had said that the party petitioning might furnish security, it would not be open for construction, but the language is: 'shall make and file a bond.' Now I do not think it can be held that, where plaintiff is required to 'make and file' a removal bond, that John Jones and Tom Brown may make and file such a bond for him. Our Supreme Court has held, in deciding the very question here under consideration in connection with a removal bond, that it must be made by the petitioner or his agent.

C. R. R. v. *Monaghan*, 140 Ill., 474.
Weed Sewing Machine Co. v. *Smith*, 71 Ill., 204."

See Opinion of Judge Payne, P. Rec., 536.

The Appellate Court of Illinois and the Supreme Court of Illinois both sustained the construction as given to this act by Judge Payne, and held that the bond was not in compliance with the Act of Congress.

See also cases cited on this point on page 24 of our former brief on motion to dismiss or affirm.

VI.

THE PETITION FOR REMOVAL WAS NOT IN COMPLIANCE WITH THE ACT IN STATING THE AMOUNT INVOLVED AT THE TIME OF BRINGING THE SUIT.

Jackson v. *Allen*, 132 U. S., 27.
LaMontagne v. *T. W. Harvey Lumber Co.*, 44 Fed. Rep., 645.

The petition for removal states:

"Your petitioner, the Farmers' Loan and Trust Com-

pany, now comes, and entering its appearance for the purposes of this petition only, and limiting its appearance to making this petition for removal, respectfully shows that it is one of the defendants in the above entitled cause and that the matter in dispute therein exceeds, exclusive of interest and costs, the sum of $2,000."

In

Jackson v. *Allen*, 132 U. S., 27,

this court said:

"It appears from the record that the citizenship of the parties at the commencement of the actions as well as at the time the petitions for removal were filed, was not sufficiently shown, and that therefore the jurisdiction of the state court was never divested.

Stevens v. *Nichols*, 130 U. S., 230.

This being so the defect cannot be cured by amendment.

Crehore v. *O. & M. Ry. Co*, 131 U. S., 240."

In the case of

LaMontagne v. *T. W. Harvey Lumber Co.*, 44 Fed. Rep., 645,

Judge JENKINS said:

"I am compelled to the conclusion that to entitle a non-resident defendant to remove the cause from a state to a Federal court the jurisdictional amount or value of the matter in dispute must exist at the commencement of the suit as well as at the time of the petition for removal; or in other words, that is the claim of the plaintiff in such suit which must alone be considered, and such claim must, at the commencement of the suit as well as at the time of application for removal, come within the jurisdictional amount."

VII.

WHERE THERE ARE TWO OR MORE TRUSTEES ALL MUST BE MADE PARTIES TO ANY SUIT CONCERNING THE TRUST PROPERTY.

Winchester v. *Loud*, 108 U. S., 130.
Penn Co. v. *Bauerle*, 143 Ill., 459.
Guion v. *Melvin*, 69 N. C., 244.
Wilson v. *Oswego Tp.*, 151 U. S., 56.
Wall v. *Thomas*, 41 Fed. Rep., 620.
Thayer v. *Life Ins. Co.*, 112 U. S., 717.
McGeorge v. *Bigstone Gap Imp. Co.*, 88 Fed. Rep., 599.

In the McGeorge case the court said:

"It is scarcely necessary to cite authority for the proposition that a power conferred upon three trustees cannot be exercised by one only. The doctrine is thus stated in 1 Perry on Trusts, Sec. 411: 'Where a settler vests his property in several co-trustees they all form as it were one collective trustee. Therefore they must perform their duties in their joint capacity, even in making a purchase. In law there is no such person known as an acting trustee apart from his co-trustees. All who accept the office are acting trustees. If any one trustee who has accepted refuses to join in the proposed act, or is incapable, the others cannot proceed without him, but an application must be made to the court. So, if trustees bring suits or defend suits in court, they must act jointly.'"

VIII.

THE SUPERIOR COURT FIRST ACQUIRED JURISDICTION OVER THE PERSONS AND SUBJECT-MATTER.

Moran v. *Sturges*, 154 U. S., 256.

Roger v. *Pitt*, 96 Fed. Rep., 669.

In this last case the authorities upon this subject are so fully reviewed and all cases upon the subject cited, that it is unnecessary to make any further argument or citations on this point, and which fully sustain us in the position that the Superior Court first acquired jurisdiction.

IX.

EVEN THOUGH A FEDERAL QUESTION WAS RAISED BY THE ANSWER AND PLEADINGS IN THE CAUSE, YET AS THE DECREE OF THE COURT WAS RIGHT UPON OTHER AND INDEPENDENT GROUNDS, THIS COURT WILL NOT TAKE JURISDICTION BUT DISMISS WRIT OF ERROR.

Pierce v. *Somerset Ry.*, 171 U. S., 641.

Harrison v. *Morton*, 171 U. S., 46.

Capital Bank v. *Cadiz Bank*, 172 U. S., 425.

Chappell Chemical Co. v. *Sulphur Mines Co.*, 172 U. S., 465.

Citizens Savings Bank v. *Owensboro*, 173 U. S., 637.

Eustis v. *Bolles*, 150 U. S., 361.

The assignment of errors numbered 16, 17, 18 and 19 were not made in the Supreme Court of Illinois, and therefore cannot be considered by this court.

Oxley Stave Co. v. *Butler Co.*, 166 U. S., 648.

L. & N. Railroad v. *Louisville*, 166 U. S., 709.

Zadig v. *Baldwin*, 166 U. S., 486.

Citizens' Savings Bank v. *Owensboro*, 173 U. S., 636.

ARGUMENT.

In view of the former brief and argument submitted on the motion to dismiss or to affirm, it is not necessary nor do we think that brief for plaintiff in error requires us to make any extended argument on the questions involved in this case. The greater portion of the brief and argument of the plaintiff in error is taken up with discussion of the questions which we think are not involved in this suit. The Lake Street Company filed this bill, not for the purpose of enjoining the plaintiff in error from acting under the trust deed. The object and purpose of the bill was to have a new trustee appointed in the place of the Farmers' Loan and Trust Company. Many reasons might have been given why this relief was desired by the Lake Street Company, but the courts below deemed one reason good and sufficient, and that was for the reason the Farmers' Loan and Trust Company had not complied with the laws of the State of Illinois as a condition of the right of its doing business in that state. Section 26, chapter 32, of the Revised Statutes of the State of Illinois, provides that "foreign corporations doing business in the State of Illinois shall be subjected to all liabilities, restrictions and duties that are or may be imposed upon corporations of like character organized under the general laws of the state, and it shall have no other or greater powers."

Corporations under the laws of the State of Illinois organized for the purpose of doing trust business are required to make a deposit of $200,000 with the state auditor, in stocks or bonds or mortgages. The Farm-

ers' Loan and Trust Company sought to do business in the State of Illinois without complying with this statute. It was and had been for years prior to assuming the trusteeship under the mortgage of April 7, 1893, an outlaw under the laws of the State of Illinois. The complainant in that bill had a right under the decisions of the Supreme Court of Illinois to presume that the Farmers' Loan and Trust Company had complied with the laws of the state and had a right to do business therein. Finding it had not complied with this law, and knowing it had no power to act or become trustee under this trust deed, it filed its bill of complaint asking and praying that a new trustee might be appointed, as it was the design and purpose of the instrument that there should be two trustees. Recognizing the fact that where there were two or more trustees that they formed as sometimes called a collective trustee, or two or more persons or corporations rolled into one, so firmly knit together and bound that it would be impossible to break the tie by severing one trustee without the other trustee or trustees were made defendants. This is so self-evident a proposition and such a well-known principle governing proceedings for the appointment of a new trustee that it is unnecessary to cite any authorities to sustain the position.

Not only was the other trustee in this case a necessary and indispensable party, but it was also necessary to have the bondholders or the *cestuis que trustent* parties to the litigation so far as it was possible to make them, and for this purpose the Northern Trust Company, as the holder of the largest amount of bonds, was made a party defendant to the proceeding.

One of the points made by the plaintiff in error in the

Appellate and the Supreme Courts was that other bondholders should have been made parties defendant, that all parties were not before the court that should have been before the court in order to entitle complainant to a decree. But upon this point all the courts have held that there was under the docrine of representation sufficient parties before the court to entitle complainant to a decree. All the bonds were in fact, with the exception of a very few, represented in the litigation. It is apparent, therefore, that neither the American Trust and Savings Bank nor the Northern Trust Company were made parties to the suit collusively or for any other purpose than the rightful and legitimate purposes of the suit.

Soon after the bill was filed a petition was presented to the court by the Farmers' Loan and Trust Company for removal of the cause to the United States court. Neither of the other defendants joined in this petition. Accompanying the petition was a document which the petitioner claimed was a bond in conformity with the act of 1887. Upon the hearing of the motion made by the petitioner for removal of this cause and after full argument, the court denied the removal. This denial was right. The petition did not set forth that at the time the suit was begun there was $2,000 involved in the controversy exclusive of costs. It was therefore defective in this respect. The bill of complaint did not show that there was any Federal question involved, so the plaintiff would not be entitled to remove upon that ground. And even if there had been a Federal question involved, then the co-defendant should have joined in such petition. The bill of complaint did not show that there was a separable controversy that could be wholly determined between the petitioner and the complainant

without the presence of the other two defendants, as they were not formal parties but necessary and indispensable parties to the litigation. And as the United States court would not have had original jurisdiction of the cause, it could not obtain jurisdiction by removal on the ground that the other two defendants were merely formal parties to the controversy. So that the court was right in denying the petition upon that ground. It was sought in the petition to inject into the case a Federal question because it was alleged that a foreclosure bill had been filed prior to the commencement of this suit, and therefore it interfered with the right of petitioner to prosecute its suit in the United States court. This court has so fully and so often determined that you could not inject a Federal question into the case either in the petition for removal or in the subsequent pleadings, that it is unnecessary to discuss that question, although a considerable portion of the brief and argument of the plaintiff in error is taken up in the discussion thereof. It was also sought by the answer and by the proof to inject into this cause a Federal question. But error was not assigned upon that question in the Supreme Court of Illinois, nor did the Supreme Court decide the question so attempted to be raised by the answer and the evidence. And even if the question were sufficiently raised by the answer and the evidence, yet the judgment of the Supreme Court was entered upon grounds fully sufficient without considering the Federal question so attempted to be injected into the case.

The Superior Court of Cook County, also the Appellate and Supreme Courts, held that the document filed by the petitioner purporting to be a bond was not in compliance with the act. This document did not name the petitioner as principal nor was it signed by the petitioner.

Strangers to the record filed this document, and the Lake Street Company could not have recovered upon the bond, for it was without consideration. The complainant was entitled, under the Act of Congress, to a bond signed by the petitioner. When the Act of Congress provides that the party shall make and file a bond it cannot be construed into meaning that any party may make and file a bond. The acts of 1875 and 1887 use different language from the earlier acts of Congress with reference to removal. The earlier acts provided that the party should give good and sufficient surety, and the bond might have been held sufficient under the earlier acts, and it must be held that Congress in making the change had an object in requiring a particular kind or form of security, viz., a bond to be made by the petitioner.

As held by this court in

K. C. Ry. Co. v. *Daughtry*, 138 U. S., 298,

it is immaterial upon what ground the court denied the right of removal, if upon the whole record it was right in denying the motion to remove.

After the motion to remove was denied, the petitioner came into court and made a motion to quash the return of service. This motion was stricken from the files, and the reason was non-compliance with the rulings of the Supreme Court of the state, and thereupon the petitioner entered its general appearance in the cause and asked leave to answer. This was entered voluntarily on the part of the petitioner, as the time for it to plead had long prior thereto expired, but it saw fit for its own purpose to file this general appearance.

A trial was had of the cause upon the merits, fully heard and determined, and if the courts below were wrong on the question of removal this court has the power

to affirm the judgment if it shall hold that the courts wers right in entering the decree upon the merits of the cause. The decree was entered and affirmed in the Supreme Court, based upon the construction of the state statute, which is binding upon this court, and if the cause should be reversed, then, under the rulings of the Supreme Court, no other decree could be entered by the United States court than the one that has been entered in this cause. This litigation has been harassing, annoying and harmful to the Lake Street Company and the holders of its bonds, and should be ended. The plaintiff in error stands upon this record as the trustee, acting against the interests of the great body of the holders of the bonds of this company and against this company, in the interest of a holder of the bonds who was a former director of the company, who assisted in making this mortgage, and who voted this issue of bonds, found by experience to be a greater burden than the company could possibly carry, and against whom a bill was filed and pending at the time the Farmers' Loan and Trust Company filed its bill of foreclosure for an accounting and to compel and require him to turn over the bonds so held by him. The parties holding the so-called Ziegler bonds could not be considered as innocent holders, because the record shows that Ziegler (in addition to being a director) purchased, and those under him, at 90 cents on the dollar, and received with the same a bonus of stock equal to the par value of the bonds. The act under which the Lake Street Company was organized and also the Constitution of Illinois provide that no stock nor bonds shall be issued by a railroad corporation except for money, labor or property actually received. This question was fully passed on in

Baker v. *G. T. & S. Dep. Co.*, 31 Atl. Rep., 174,

where it was held that bonds issued under almost identical circumstances were void. There was an injunction pending at the time under this bill against the trustees foreclosing or taking any action on request of the Ziegler bonds, so called. Not another holder of bonds had made any request or demand upon either of the trustees to take any proceedings toward foreclosure. The company had agreed upon a fair, just and equitable arrangement with the holders of its bonds, and in fact had agreed to pay more interest than the record shows it was able to pay. It has, however, struggled along under the load until now it has reached that point where, if this litigation could be ended, foreclosure can be avoided, and the bondholders who have agreed to the arrangement will receive, eventually, 75 per cent. of the par value of their bonds, with interest on 60 per cent. and possibly upon their 15 per cent. of income bonds.

The courts favor reorganization of railroads where they are unable to pay the interest upon their bonded indebtedness. They favor a reorganization when it can be made without necessity and expense of foreclosure proceedings. The action of the plaintiff in error in this case is without parallel in the history of the jurisprudence of this country. Instead of aiding by counsel and advice the company to extricate itself from financial difficulty, and assisting the bondholders to receive that to which they will be justly entitled, it is sought, as shown by this record, to harass, annoy and destroy, if possible, the Lake Street Company. Its attitude as shown by this record is not commendable, and received in the Superior Court the just condemnation of the trial judge.

It must be apparent to the court that the United States Court would not and did not have any jurisdiction over

the foreclosure bill. There can be no question that in that suit the American Trust and Savings Bank must be arranged along with the complainant, the Farmers' Loan and Trust Company, so that we not only have the Farmers' Loan and Trust Company acting against the interests and wishes of the bondholders of the company, but it also filed a bill in a court where it must and is bound to know the court has no jurisdiction. What its object and purpose may have been it is not for us at this time to say.

It may not be amiss to say that before this writ of error was granted by Mr. Justice Brown, and after the Supreme Court had adjourned for the term, that a mandate was sued out of that court. The American Trust and Savings Bank thereupon appointed the Equitable Trust Company as co-trustee, and which appointment the Superior Court, on June 24, 1898, by a supplemental decree confirmed the Equitable Trust Company as trustee in the place of the Farmers' Loan and Trust Company, all of which is shown by the supplemental record filed in this court.

Thereupon, upon the grounds stated in our brief filed in this cause on motion to dismiss or to affirm, and also stated herein, we respectfully submit that the court ought to dismiss the writ of error or affirm the judgment of the Supreme Court of Illinois.

Respectfully submitted.

CLARENCE A. KNIGHT,
Solicitor for Lake Street Elevated Railroad Company.